Petition

Supreme Court, U.S.
FILED
MAR 31 1982
ALEXANDER L. STEVAS
CLERK

81-1821

CASE NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

SUPER EXCAVATORS, INC.,

Petitioner,

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and SECRETARY OF LABOR,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Super Excavators, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the Order of the respondent Occupational Safety and Health Review Commission.

QUESTIONS PRESENTED FOR REVIEW

I. Whether §3(8) of the Occupational Safety and Health Act of 1970 (Act) is incorporated in §6(a) of the Act so that in prosecuting a violation of any "established Federal standard" promulgated by the Secretary under §6(a) as a safety standard, the Secretary must make the threshold showing by substantial evidence that the violation produced a significant risk of harm in the workplace, and the standard is reasonably necessary and appropriate under the guidelines required for promulgation of safety standards under §6(b) of the Act.

II. Whether the basic definition of §3(8) of the Act and the fact finding requirements of §6(b) must be incorporated in §6(a) requiring the Secretary to find a significant risk of harm and probability of significant benefit from a standard before promulgation, otherwise, §6(a) would be an impermissible delegation of legislative power to the Secretary.

III. Whether 29 C.F.R. §1926.652 recommending approximate angles of repose for sloping sides of excavations is impermissibly vague as applied to trenches so as to violate due process.

IV. Whether findings of the Commission supported only by the opinion of an expert without underlying facts satisfy the test of "substantial evidence on the record considered as a whole" under §11(a) of the Act so as to be conclusive on the reviewing court, or whether the court is required to determine if the findings are supported by facts and are reasonable.

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Seventh Circuit, entered December 31, 1981, review of which is sought, (No. 80-2318) is in process of publication, — F.2d —, and is reprinted here as Appendix A. The final Order of the respondent Occupational Safety and Health Review Commission dated July 24, 1980, denied review of the decision of the Administrative Law Judge dated June 24, 1980, which is reprinted here as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered December 31, 1981. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions are:

Art. I, Sec. 1 Legislative powers vested in Congress. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Art. I, Sec. 8, Cl. 18. All necessary and proper laws. [The Congress shall have power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment Article V. Due process.

> No person shall . . . be deprived of . . . property without due process of law; . . .

Statutes and Regulations:

29 U.S.C. §651. (Section 2) Congressional findings and purpose.

29 U.S.C. §652. (Section 3) Definitions.

29 U.S.C. §654. (Section 5) Duties of employer and employee.

29 U.S.C. §655. (Section 6) Standards.

29 U.S.C. §660. (Section 11) Judicial review.

29 U.S.C. §666. (Section 17) Penalties.

29 C.F.R. §1926.652 OSHA, Specific Trenching Requirements.

The statutes and regulations involved are reprinted herein as Appendix C.

STATEMENT OF THE CASE

On April 16, 1979, the respondent Secretary of Labor (Secretary) issued a citation charging petitioner with having, on March 29, 1979, violated 29 C.F.R. §1926.652 (b) that provides trenches in unstable or soft material five feet or more in depth shall be sloped or supported to protect employees working in them. The table following the C.F.R section recommended the approximate angle for sloping sides of excavations in average soils to be 45 degrees. A photograph of the trench is reprinted here as Exhibit D for purposes of clarity and to assist verbal description.

OSHA inspector Godfrey inspected the trench excavated by petitioner and noticed small particles of sand sloughing off the top of the trench. He did not measure the slope of the trench's sides, nor did he know whether the trench was in clay or in sand, and was unsure whether an offense even existed because he was unqualified to make the evaluation.

Godfrey conducted a walk around inspection sometime later when the trench operation had progressed about 100 feet north of where Godfrey had made his initial inspection, and where subsoil conditions and trench configuration were different.

During the administrative hearing, the government's case consisted of the observations of Godfrey, and of the opinion of Dr. Painter, a soil mechanics engineer, who never visited the trench site. Painter felt the soil at the initial site visited by Godfrey was unstable. There was no evidence that the slope of the trench presented a recognized hazard or a significant risk of harm in the workplace.

Petitioner produced a number of experienced engineers and experienced employees who were present at the site and testified the workplace was completely safe.

The Court of Appeals doubted very much whether it would have believed Painter's opinion, based largely on photographs and conjecture, over the opinions of petitioner's witnesses, all of who were at the site daily, but declined to substitute its judgment for that of the Commission stating it was supported by substantial evidence on the record, considered as a whole, and conclusive on the court. The court felt Painter's testimony provided proof of the violation.

The Court of Appeals refused to apply the rule of "significant risk" under the authority of *Industrial Union Dept. v. American Petroleum Institute,* 448 U.S. 607, 100 S.Ct. 2844 (1980), stating that decision was limited to the Secretary's rulemaking authority and inapplicable to his enforcement power. The court held a prima facie violation of the Act requires only the proof of a regulatory standard and its violation, where the standard is specific.

The Court of Appeals also declined to find the trench standards under 29 C.F.R. §1926.652(b) unenforceably vague. It determined the tables recommending approximate angles of respose for sloping the sides of excavations was sufficiently specific as applied to trenches.

REASONS FOR GRANTING THE WRIT

I. There is a connflict between Courts of Appeals as to the application of *Industrial Union* to the Act, and standards of the decision have been misapprehended and grossly misapplied.

A. Conflicts between Courts of Appeals basis for certiorari.

The decision of the Supreme Court in *Industrial Union v. American Petroleum,* 448 U.S. 607, 100 S.Ct. 2844 (1980) has resulted in conflict in its application by different Courts of Appeals. The conflicts arise out of important issues and present a case of first impression in this court. This court will grant certiorari when there is a conflict of opinion in the Courts of Appeals, *NLRB v. Pittsburgh S.S. CO.,* 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453 (1951), or where there is an embarrassing conflict of opinion and authority, *Rice v. Sioux City Me-*

morial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955) or where there are different conclusions, *Shapiro v. United States*, 235 U.S. 412, 59 L.Ed. 291, 35 S.Ct. 122 (1914), *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 100 S.Ct. 883 (1980). By reason of the conflict, one or more of the Courts of Appeals has misapprehended or grossly misapplied the decision, *American Textile Mfrs. Institute Inc. v. Donovan*, ... U.S. ....., 101 S.Ct. 2478 (1981).

B. Courts of Appeals that have applied the *Industrial Union* decision to enforcement provisions of the Act.

The Second Circuit in *Pratt & Whitney Aircraft, Etc. v. Secretary of Labor*, 649 F.2d 96 (CA 2, 1981) applied *Industrial Union* to hold the Commission could not establish a violation whenever a hazardous combination is only possible, but the act is intended only to guard against significant risks. The court stated that before promulgating any standard, the Secretary must make the threshold finding that the workplaces in question are not safe. The Fifth Circuit in *Louisiana Chemical Ass'n. v. Bingham*, 657 F.2d 777 (CA 5, 1981) held that the definitions in §3(8) encompass virtually every requirement that the Secretary has ever promulgated, or might ever promulgate, as a regulation.

C. Courts of Appeals who have declined to apply *Industrial Union* to enforcement procedures under the Act.

The Seventh Circuit in this case held *Industrial Union* was limited to the Secretary's rulemaking authority under §6(b)(5) of the Act and not controlling the Secretary's enforcement power under §6(a).

D. Importance of issue and continuing application.

In *Industrial Union,* Mr. Justice Stevens indicated the application of standards to the rulemaking authority of the Secretary under §6(b) (5) of the Act was an unusually important case of first impression. The application of standards to the enforcement provisions of the Act under §6(a) is equally important and is also a case of first impression. The Secretary, in moving the Court of Appeals to publish its opinion in this case, stated the issue has been raised in an appeal pending in the Ninth Circuit Circuit and in another appeal pending in the Seventh Circuit. A ruling on the issue in this court would be dispositive.

II. Authority granted to the Secretary under §6(a) of the Act to promulgate any national consensus standard or any established Federal standard as an occupational safety or health standard is an impermissible delegation of legislative power unless this court impresses the authority with the parameters of *Industrial Union.*

The Constitution vests legislative powers in the Congress, Art. I, Sec. 1, and grants the Congress power to make all laws for carrying its powers into execution, Art. I, Sec. 8, Cl. 18. The sweeping authority granted the Secretary in §6(a) of the Act to promulgate as a standard any national consensus or any established Federal standard is an open-ended grant condemned in *Schechter Poultry Corporation v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) and in *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241 (1935). §6(a) encompasses some of the quantifying criteria which this court in *Industrial Union* required of the Secretary to make §6(b) constitutionally viable. Absent any statutory norm, the Secretary is at liberty to legislate any

standard into a penal provision. Where a Federal contractor decides not to comply with Federal safety standards at his election, he becomes ineligible for the Federal contract. The construction placed upon §6(a) by the Court of Appeals would permit the Secretary, at whim, to transform the optional Federal standard into conduct subject to penalties under §17 of the Act. The mischief obtaining, and the extensive litigation resulting, can be mitigated by a determination extending the rule of *Industrial Union* to §6(a) of the Act.

III. Conflict between Circuits on constitutional vagueness of 29 C.F.R. §1926.652.

The Ninth Circuit in *Lloyd C. Lockrem, Inc. v. United States,* 609 F.2d 940 (CA 9, 1979) held the confusion between excavations and trenches, found in §1926.651 and .652 are so ambiguous as to be unenforceable under the due process clause of the Constitution (Amendment Art. V.). The Seventh Circuit, in this case, held the recommended approximate excavation slopes were applicable to trench slopes and were not vague. The court did not address itself to failure of the regulations to specify different types of soils, or different configurations, or different conditions obtaining in excavations as opposed to trenches as did the court in *Lockrem.*

IV. Judicial review of the Commission decisions requires a finding of reasonableness.

The Court of Appeals in this case found the critical fact of unstable soil was established by opinion of an expert who never visited the site. It determined that opinion evidence is sufficient to support "substantial evidence on the record considered as a whole". The Tenth Circuit in *CTM, Inc. v Occupational Safety & Health Rev.,* 572

F.2d 262 (CA 10, 1978) held the substantial evidence rule required the court to determine whether, based on the record, the findings are reasonable. Had the Seventh Circuit followed the Tenth Circuit rule, it would have reversed the Commission since it doubted whether it would have believed the opinion of the Secretary's expert based largely on photographs and conjecture. It seems axiomatic that a finding of fact should find its support in evidentiary facts and not in isolated unsupported opinion.

This court should give its authoritative definition to "substantial evidence on the record considered as a whole" parameter for judicial review under §11 of the Act.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit has decided an important statutory interpretation and constitutional question of first impression in conflict with the decision in the Second Circuit. The decision of the Seventh Circuit seems opposite to the concern of this court as to impermissible delegation of legislative power found in *Industrial Union*. If the basis definition of §3(8) and the fact finding requirements of §6(b) of the Act are not incorporated in §6(a), then §6(a) would constitute an impermissible delegation of legislative power by the Congress to the Secretary.

The decision in the Seventh Circuit clashes with the decision of the Tenth Circuit over the constitutional vagueness of the trenching requirements. Since public works involving trenching is a continuing and important industry, the conflict should be resolved.

This court should place authoritative definition upon the review criteria of the Courts of Appeals from decisions of the Commission. The reasonableness test of the Tenth Circuit seems better reasoned than the any testimony test of the Seventh Circuit. The Courts of Appeals might well be informed by an authoritative definition of the scope of review of findings of fact by the Commission.

The conflicts among the Circuits upon the issues in this case are of special importance and should be seasonably resolved. The petition for writ of certiorari should be granted.

Respectfully submitted,

MARK M. CAMP
Attorneyf or Petitioner

Appendix

APPENDIX A

In the

UNIITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 80-2318

SUPER EXCAVATORS, INC.,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,

Respondent.

SECRETARY OF LABOR,

Party-Respondent.

Petition for Review of an Order of the Occupational Safety and Health Review Commission.

ARGUED DECEMBER 9, 1981—DECIDED DECEMBER 31, 1981*

Before SPRECHER, BAUER, *Circuit Judges,* and ROSZKOWSKI, *District Judge.***

PER CURIAM. The Occupational Safety and Health Administration (OSHA) issued a citation on April 16,

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* This appeal was originally decided by an unpublished order on December 31, 1981, pursuant to Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** The Honorable Stanley J. Roszkowski, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

1979, charging petitioner Super Excavators, Inc., with violating provisions of the Occupational Safety and Health Act of 1970 (Act)[1] and regulations thereunder[2] that govern safety requirements for trenches. After a hearing an Administrative Law Judge (ALJ) agreed with OSHA and found a violation. The Occupational Safety and Health Review Commission (Commission) denied discretionary review, issued a final order finding a violation, and imposed a $1440.00 penalty. Pursuant to 29 U.S.C. §660(a), petitioner seeks review of the Commission's decision. We affirm.

I

OSHA compliance officer John R. Godfrey inspected a trench petitioner was digging as part of a municipal sewer project. Godfrey's experience and expertise in trench inspection was decidedly limited: he lacked formal training in engineering[3] and had previously inspected only three or four trenches other than petitioner's. De-

---

[1] Section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), requires that each employer "shall comply with occupational safety and health standards promulgated under this Act." Section 17(a), 29 U.S.C. §666(a), provides a civil penalty of up to $10,000 for a repeated violation of the Act.

[2] 29 CFR 1926.652(b) provides:

> Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section). [Table P-1 recommends a 45-degree angle of repose for averaging soils.]

29 CFR 1926.653(q) defines unstable soil as

> [e]arth material, other than running, that because of its nature or the influence of related conditions, cannot be depended upon to remain in place without extra support, such as would be furnished by a system of shoring.

[3] Godfrey's only training was eighteen weeks of various courses taught by OSHA, only one of which dealt with trench construction.

spite these handicaps, Godfrey concluded that petitioner's trench posed a serious cave-in hazard, in violation of OSHA regulations, because he observed small particles of sand sloughing off the top of the trench. Godfrey did not measure the slope of the trench's sides nor did he know whether the trench was in clay, which is cohesive and unlikely to collapse, or sand, which is unstable and given to collapse. Indeed, after conducting a walk around inspection, Godfrey was unsure whether an offense even existed, because he "wasn't really qualified to make this evaluation." Tr. at 62. Nevertheless, nearly two weeks after the inspection, a citation issued against petitioner.

During the administrative hearing, the government's evidence consisted of testimony by Godfrey, outlined above, and by Dr. William T. Painter, president of a company specializing in soil mechanics and foundation engineering. Painter, who never visited the trench site, testified that the trench's angulation was too steep and that its soil consistency was unstable. He based his expert opinion, in part, on a soil sample produced from a test boring taken 100 feet from the location designated in the OSHA citation. Although the boring could accurately illustrate soil composition if drilled within a few feet of the actual site, Painter admitted that subsoil could vary greatly along the length of a trench, thereby casting doubt upon the relevancy of the test boring. He did indicate, however, that his opinion was also based on other factors, such as the type of soil revealed in pictures taken by Godfrey, the moisture in the ground that would normally thaw during late March, and the rapid trench-wall collapse falling rain would cause.

Petitioner, on the other hand, produced a number of witnesses who testified that the trenching operation was

completely safe. For the most part they were engineers, experienced employees, or both. Among other things, these witnesses pointed out that the heavy weight of the trucks and backhoe working the site caused no significant dirt slippage, nor did these vehicles sink into the ground, thereby evidencing the subsoil's strong support. Similarly, routine tests and inspections by petitioner's witnesses demonstrated that the ground was mainly composed of cohesive, solid clay. The ALJ, however, accepted Painter's opinion over those rendered by petitioner's witnesses and, as a result, concluded that the trench soil was "average," meaning unstable. Therefore, the ALJ found a violation of 29 C.F.R. 1926.652(b).

II

Petitioner claims that the record, considered as a whole, does not present substantial evidence to support the Commission's findings. In addition, petitioner argues that a violation can be found only if the trench posed a significant risk of harm in the workplace. We disagree with both contentions.

Given the conflicting expert opinions, we can understand petitioner's disenchantment with the decision of the ALJ and the Commission. Were we the trier of fact in this case, we doubt very much whether we would have believed Painter's opinion, based largely on photographs and conjecture, over the opinions of petitioner's witnesses, all of whom were at the site daily. But our role is more limited. "We clearly may not substitute our judgment for that of the [Commission]." *International Harvester Co. v. OSHRC,* 628 F.2d 982, 987 (7th Cir. 1980). The Commission's findings of fact, if supported by substantial evidence on the record considered as a

whole, are conclusive. *See* 29 U.S.C. §660(a); *International Harvester,* 628 F.2d at 986.

The present case turned upon a close question of credibility, and we are not at liberty to overturn credibility resolutions unless they are contradicted by "uncontrovertible documentary evidence or physical facts." *International Harvester,* 628 F.2d at 986, *quoting Olin Construction Co. v. OSHRC,* 525 F.2d 464, 467 (2d Cir. 1975). No such documentary evidence or physical facts are present here, just differing expert opinions. Therefore, in light of Painter's testimony, we conclude that the evidence supporting the Commission's decision, though far from overwhelming, is substantial.

Petitioner's second argument, that the Commission's decision must be reversed because it contains no finding that petitioner's employees faced a "significant risk" of harm while in the trench, is also without merit. Petitioner's authority for this proposition is *Industrial Union Dept. v. American Petroleum Institute,* 448 U.S. 607 (1980). That decision, however, is inapposite. The Supreme Court in *Industrial Union* was concerned that Congress might have unconstitutionally delegated legislative power to the Secretary of Labor by granting the Secretary sweeping authority to set permanent health standards under section 6(b)(5) of the Act, 29 U.S.C. §655(b)(5). To limit the Secretary's power, the Court construed section 6(b)(5) as implicitly requiring the Secretary to make a threshold finding that significant occupational risks are present before promulgating any permanent health standard. 448 U.S. at 642. Thus, *Industrial Union* chiefly examined the scope of the Secretary's rulemaking authority under section 6(b)(5). In this case, however, petitioner challenges the standard

governing the Secretary's enforcement power under section 6(a) of the Act, not the Secretary's rulemaking authority under section 6(b)(5). Clearly, then, *Industrial Union* is not controlling.

To state a prima facie violation of the Act, the Secretary need only prove a regulatory standard and its violation, where the standard is specific. *Greyhound Lines-West v. Marshall,* 575 F.2d 759, 762 (9th Cir. 1978). 29 C.F.R. 1926.652(b), which sets out proper trench dimensions and requires bracing or other supports to prevent cave-ins, is quite specific. Dr. Painter's testimony provided proof of the violation. Therefore, the Secretary established a prima facie case.

Petitioner's final argument is that the trench standards under 29 C.F.R. 1926.652(b) are vague. We disagree. Petitioner principally relies on workshop materials that criticize 29 C.F.R. 1926.652(b), but these materials are designated "not for reference or publication." Since the workshop materials obviously are not published regulations, we attach no significance to them. The challenged regulation lists trench measurements and incorporates various tables recommending appropriate trench slope inclination. In addition, 29 C.F.R. 1926.-653(q) defines "unstable soil." The standards, therefore, are not vague.

III

We have considered petitioner's remaining arguments and find them without merit. Accordingly, the Commission's decision is

AFFIRMED.

APPENDIX B

DECISION OF THE ADMINISTRATIVE LAW JUDGE

(Formal Parts Omitted)

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970.

A citation was issued by the complainant (Secretary) on April 16, 1979, charging the respondent Super Excavators, Inc., with a repeated violation of one of the safety standards promulgated under the Act. The citation was the result of an inspection by an OSHA compliance officer made on March 29, 1979, at a worksite in Nashota, Wisconsin, where Super Excavators was laying a subterranean sewer pipe.

A hearing was held in Milwaukee on December 4, 5 and 6, 1979. The Secretary was represented by Attorney Nancy Boyland Collins of the Office of the Solicitor, Department of Labor, Chicago. Super Excavators was represented by Attorney Mark M. Camp of Pfannerstill, Camp & Henderson, Milwaukee. A post hearing brief was submitted by the Secretary, but none was filed by the respondent.

The citation alleges the trench that respondent was excavating for the sewer line was not supported or sloped in accordance with the applicable OSHA standard. The citation states:

> The side(s) of the trench(es) in unstable or soft material which were more than 5 feet in depth, were not shored, sheeted, braced, sloped or otherwise supported in accordance with Tables P-1 and P-2:
>
> > Employees working in trench 7 feet 9 inches deep, 11 feet wide, varying length. Located east

side of Road C, between Nashotah and Delafield, trench running in a north and south direction. No shoring, sloping. Employees exposed to hazard of cave-in.

The standard, 29 CFR 1926.652(b), reads as follows:

(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section)

Table P-1, referred to in the standard, prescribes the angle of repose for the sides of trenches in various types of soil. For "average" soils, the angle of the slope required by the standard is approximately 45 degrees. For more stable soils, denomenated in Table P-1 as "compacted angular gravels" the required slope is approximately 63 degrees.

The testimony disclosed that no shoring was being used on the day of the inspection. The trench was 7 feet 9 inches deep and 11 feet wide at the top. (T 12) The width at the bottom was not measured. It was presumed by the parties to be three feet — the bottom width of the bucket on the backhoe that was digging the trench. (T 242, Exh. R-18) These dimensions establish that the angle of the slope would have been approximately 63 degrees. (T 127) This, as indicated above is an adequate slope in compacted soil, but would not be adequate in average soil.

The OSHA inspector testified that he observed employees at work in the trench. He believed the walls were unstable because he saw dirt "sloughing off" the sides. (T 21) One of the photographs he took (Exh. C-a) gives appreciable credence to his statement.

The government's expert witness, Dr. Painter, testified that the soils in the trench would be classified as "average" soils, and must therefore be deemed to be soft and unstable. (T 133, 134, 140) He stated the safe angle of repose under such conditions would be 45 degrees. (T 142)

The four witnesses for the respondent, including Dr. Buettner, a soils expert, each expressed the opinion that the soil was stable and that the trench walls were safe. (T 248, 280, 281, 315, 349, 380, 381)

The critical issue in the case, therefore, is whether the soil is of "average" composition as alleged by the complainant, or is of stable consistency as contended by the respondent.

Photographs taken by the government inspector (C-d, C-f, C-h) indicate that the lower portion of the trench is more compact and stable than the upper two or three feet. The upper area appears nonhomogeonous, and is pitted here and there with concavities obviously due to slippage of dirt. The lower portions of the trench show uniform surfaces that generally reflect the contour of the edge of the backhoe bucket.

The only soil testing in the area was done by the respondent. That consisted of one test boring. The test results proved unpalatable to the respondent. Dr. Buettner, respondent's soils expert, eliminated the test boring (which was made at his direction at a site selected by respondent) from consideration. (T 342, T 358) The validity of his opinion rested solely upon the photographs and the trial testimony. (T 364)

The test boring, which took soil samplings to a depth of five feet (T 116, C-9), established that the subsoil was

mainly sand, with 30 to 50 percent silt and clay. (T 133) This would be categorized as "average" soil. (T 139) As such, it was relatively low in cohesion. (T 131) This lack of cohesiveness was confirmed by stress tests to which the soil samples were subjected. (Exh. C-9)

Dr. Buettner's stated reason for disregarding the results of his soil test was that he discovered at a later time that the test boring was not at the site "where OSHA has made its complaint." (T 343) The evidence shows the test boring to be close to the sewer line, some 75 to 100 feet north of the spot shown in the government photos. (Exh. R-15) Dr. Buettner stated this was "remote from the trench," (T 353) and that "even in 20 feet, you can see marked changes in soil characteristics." (T 352)

Dr. Painter, the government's expert felt that the test boring had relevancy. He stated, ". . . this was a pertinent boring to the entire excavation of the area . . . I would say the boring is relevant. It has to be considered." (T 134) Dr. Painter stated that he was of the opinion, from trial evidence other than the test boring, that the soil in the trench was "average." He felt that Dr. Buettner's soil test was consistent with, and a reinforcement of, that opinion. (T 134, 157)

On balance, the testimony of Dr. Painter is deemed more credible than that of respondent's expert. Surely the soil test, taken down the sewer line less than 100 feet from the alleged violation site has some relevancy. Expert opinion that totally rejects relevant evidence must be viewed askance.

I conclude that the soil in the trench walls was unstable and constituted a hazard against which the cited standard seeks to protect workers. The failure of respondent to

properly shore or slope placed it in violation. The citation must be affirmed.

The evidence and the record as a whole, support the following FINDINGS OF FACT:

1. Respondent is a corporation having an office and place of business in Menomonee Falls, Wisconsin, where it engages in the business of laying sewer lines and water mains.

2. On or about March 29, 1979, respondent was constructing a sewer line in the vicinity of West 330, North 4113 Road C, Nashotah, Wisconsin.

3. In connection with such construction, respondent handled 400 lineal feet of pipe manufactured of the State of Wisconsin; respondent used a Michigan end loader manufactured outside of Wisconsin; three-fourths of funding for such construction was from federal funds.

4. Respondent was engaged in a business affecting interstate commerce.

5. Respondent had excavated a trench 7 feet 9 inches deep, 36 inches wide at the bottom, and 11 feet wide at the top.

6. The trench was not shored, and had a slope of approximately 63 degrees.

7. Some soil was sloughing off the upper two or three feet of the trench.

8. The soil consisted of a mixture of sand, silt and clay.

9. The soil was of a makeup that would be classified as "average" soil.

10. Average soil is soil that is soft and unstable.

11. Trenches dug more than 5 feet deep in average soil require a 45 degree slope.

12. The respondent has not sought to establish, by argument, brief or otherwise, that there is merit in its defense relating to vagueness of the cited standard.

13. Respondent was issued an earlier citation on August 9, 1977, charging violation of a trenching standard, 29 CFR 1926.652(b); the citation became a final order of the Commission due to failure of respondent to contest the same.

14. Respondent has failed to rebut the allegation that the present citation is, in fact, a repeated violation.

15. The penalty proposed in the sum of $1440.00 is appropriate under the facts and circumstances of the case.

From the above findings of fact, the following conclusions of law are reached:

CONCLUSIONS OF LAW

1. Respondent was at all times material an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act.

2. Respondent was at all times subject to the requirements of the Act and the standards promulgated thereunder.

3. The commission has jurisdiction of the parties and the subject matter of this proceeding.

4. Respondent violated 29 CFR 1926.652(b), for which violation a penalty of $1440.00 should be imposed.

5. The violation is a repeated violation.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is now ORDERED that:

1. Repeated Citation No. 1 is affirmed and a penalty of $1440.00 is imposed.

/s/ Ralph B. Maxwell

Ralph B. Maxwell
Judge, OSHRC

Dated: June 24, 1980

APPENDIX C

STATUTES AND REGULATIONS INVOLVED

29 U.S.C. §651. Congressional findings and purpose (Section 2)

[(a)] The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources —

(1) by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

(2) by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational and Health Review Commission for carrying out adjudicatory functions under the Act;

* * *

29 U.S.C. §652. Definitions (Section 3)
For the purposes of this Act—

* * *

(8) The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

(9) The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act [Dec. 29, 1970].

29 U.S.C. §654. Duties of employer and employee (Section 5)

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from rec-

ognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

* * *

29 U.S.C. §655. Standards (Section 6)

(a) Promulgation by Secretary of national consensus standards and established federal standards—Time for promulgation—Conflicting standards. Without regard to chapter 5 of title 5, United States Code [5 USCS §§500-576], or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards. The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, up the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health, Education, and Welfare, the National Institute for Occupa-

tional Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this Act, the Secretary may request the recommendations of an advisory committee appointed under section 7 of this Act [29 USCS §656]. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health, Education, and Welfare, together with all pertinent factual information developed by the Secretary or the Secretary of Health, Education, and Welfare, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under

paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of

his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6) (A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice

to employees and an opportunity for a hearing: Provided, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health, Education, and Welfare certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health, Education, and Welfare designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of same use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition,

where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health, Education, and Welfare, such examinations may be furnished at the expense of the Secretary of Health, Education, and Welfare. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health, Education, and Welfare, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health, Education, and Welfare, may by rule promulgated pursuant to section 553 of title 5, United States Code, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this Act than the national consensus standard.

29 U.S.C. §660. Judicial review (Section 11)

(a) Filing of petition by persons adversely affected or aggrieved—Orders subject to review—Jurisdiction—

Venue—Procedure—Conclusiveness of record and findings of Commission—Appropriate relief—Finality of judgment. Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 [29 USCS §659(c)] may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, . . . by filing in such court . . . a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. . . . No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28, United States Code. . . .

29 U.S.C. §666. Penalties (Section 17)

(a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act [29 USCS §654],

any standard, rule, or order promulgated pursuant to section 6 of this Act [29 USCS §655], or regulations prescribed pursuant to this Act may be assessed a civil penalty of not more than $10,000 for each violation.

* * *

Chapter XVII — Occupational Safety and Health Admin.

§1926.652 Specific trenching requirements.

(a) Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected.

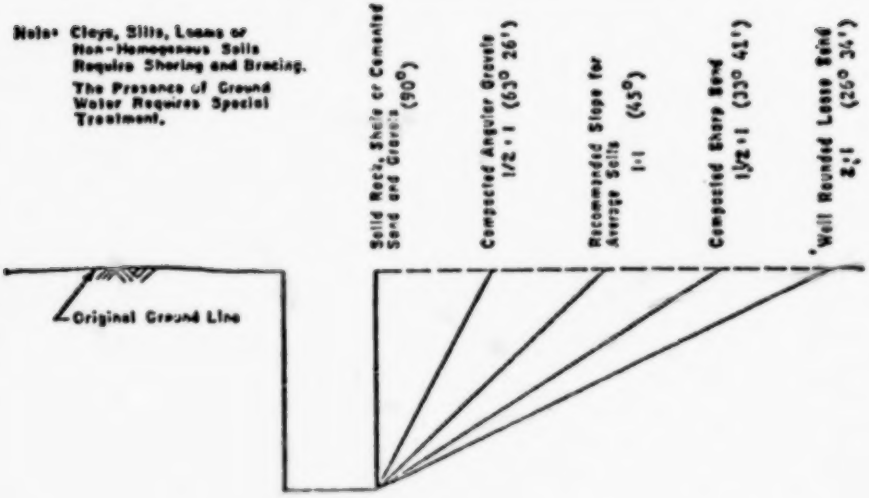
(b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).

(c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

* * *

Table P - 1

APPROXIMATE ANGLE OF REPOSE
FOR SLOPING OF SIDES OF EXCAVATIONS


Note: Clays, Silts, Loams or Non-Homogeneous Soils Require Shoring and Bracing.
The Presence of Ground Water Requires Special Treatment.
Solid Rock, Shale or Cemented Sand and Gravels (90°)
Compacted Angular Gravels 1/2 : 1 (63° 26')
Recommended Slope for Average Soils 1:1 (45°)
Compacted Sharp Sand 1/2 : 1 (33° 41')
Well Rounded Loose Sand 2:1 (26° 34')
Original Ground Line

APPENDIX D

OSHA Inspector's Photograph of Worksite (Exh. 2-H) referenced in Court of Appeals Decision

Opposition

Office - Supreme Court, U.S.
FILED
MAY 25 1982
ALEXANDER L. STEVAS,

No. 81-1821

In the Supreme Court of the United States

OCTOBER TERM, 1981

SUPER EXCAVATORS, INC., PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Secretary of Labor, when enforcing the requirements of a federal occupational safety standard promulgated under Section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(a), must prove that the violation created a significant risk of harm at a particular worksite.

2. Whether the Secretary's safety standard for trenching, 29 C.F.R. 1926.652, is unconstitutionally vague.

3. Whether the court of appeals misapplied the substantial evidence test.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 674 F.2d 592. The opinion of the administrative law judge of the Occupational Safety and Health Review Commission (Pet. App. A-7 to A-13) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1981. The petition for a writ of certiorari was filed on March 31, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 29, 1979, a compliance officer of the Occupational Safety and Health Administration (OSHA) inspected petitioner's worksite in Nashotah, Wisconsin, where petitioner was installing a subterranean sewer pipe (Pet. App. A-7). As a result of this inspection, the Secretary charged petitioner with a repeated violation of Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(2), for failure to comply with the requirements of 29 C.F.R. 1926.652(b) (Pet. App. A-23 to A-24). That safety standard requires that any trench that is opened in "unstable or soft material" to a depth greater than five feet shall have its sides sloped to a 45-degree angle or otherwise be reinforced to prevent collapse (*id.* at A-24 to A-25). Petitioner contested the citation and the matter was tried before an administrative law judge (ALJ) of the Occupational Safety and Health Review Commission.

The evidence at the hearing established that the sides of the trench were sloped to an angle of approximately 63 degrees, which was sufficient (under the safety standard) for more stable soils but fell short of the requisite 45-degree slope for "soft" or "unstable" soil (Pet. App. A-8).[1] The Secretary's expert witness testified that the soil was "average," that is, soft and unstable, based on his evaluation of

[1] "Unstable soil" is defined in the Secretary's regulations as earth material "that because of its nature or the influence of related conditions, cannot be depended upon to remain in place without extra support, such as would be furnished by a system of shoring." 29 C.F.R. 1926.653(q). Table P-1 in the regulation (Pet. App. A-25) prescribes a 45-degree angle for "average" soils, which are considered "unstable" or "soft" soils for the purposes of complying with 29 C.F.R. 1926.652(b). See *Connecticut Natural Gas Corp.*, 1978 O.S.H.D. (CCH) ¶22,874, at 27,668.

the testimony describing the soil and weather conditions and on the appearance of the soil in photographs introduced at trial (*id.* at A-3, A-9 to A-10). He also believed that a soil sample, which petitioner had taken 75 to 100 feet farther along the trench and which concededly showed the soil to be average, supported his opinion that the soil at the inspection site was unstable (*id.* at A-3, A-10). He concluded that a 45-degree slope was necessary to protect the employees (*id.* at A-3, A-9).

Three of petitioner's employees testified that the trench was completely safe (Pet. App. A-3 to A-4, A-9). Petitioner also produced an expert who gave his opinion, based on the information developed at trial, that the soil was stable (*id.* at A-9). Petitioner's expert refused to attribute any significance to the test boring, which showed the soil to be average, reasoning that the sample was taken too far from the inspection site to be relevant (*id.* at A-10).

The ALJ found the testimony of the Secretary's expert to be more credible than that of petitioner's expert, noting that the soil sample rejected by petitioner's witness was relevant and concluding that "[e]xpert opinion that totally rejects relevant evidence must be viewed askance" (Pet. App. A-10). Accordingly, the ALJ affirmed the citation; that decision became final when the Review Commission declined to exercise its discretionary review authority. See 29 U.S.C. 661(i).

2. The court of appeals affirmed (Pet. App. A-1 to A-6). The court concluded that the ALJ's finding concerning the unstable nature of the soil was supported by substantial evidence (*id.* at A-4 to A-5). While the court indicated that it might have reached conclusions different from those of the ALJ if it had been the fact-finder, it acknowledged that, under the

Act, its review of factual questions was quite limited, particularly where the issue turned on conflicting expert opinions (*ibid.*). Because there was no uncontrovertible documentary evidence or physical facts contradicting the testimony of the Secretary's expert witness, the court refused to disturb the ALJ's credibility resolution of the conflicting evidence (*id.* at A-5).

The court also rejected petitioner's contention that under the plurality decision in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607 (1980), the Secretary was required to prove that petitioner's employees in the trench were exposed to a significant risk of harm (Pet. App. A-5). Noting that *Industrial Union Department* addressed only the Secretary's authority to issue new occupational safety and health standards under Section 6(b) of the Act, 29 U.S.C. 655(b), the court below concluded that nothing in that case limited the Secretary's authority to enforce standards previously issued under Section 6(a), 29 U.S.C. 655(a) (Pet. App. A-5 to A-6).[2] Rather, the court said, where a standard is specific, the Secretary's prima facie case need only consist of proof that the employer had breached the terms of the standard (*id.* at A-6). The court found (*ibid.*) that 29 C.F.R. 1926.652, the regulatory standard at issue here, was "quite specific."

Finally, the court concluded that the regulation gave constitutionally adequate notice of its requirements (Pet. App. A-6). The detailed specifications of Section 1926.652(b), together with the definition of unstable soil found in 29 C.F.R. 1926.653(q), were found sufficiently explicit to withstand petitioner's vagueness challenge.

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[2] Sections 6(a) and 6(b) of the Act are set forth at Pet. App. A-16 to A-22.

ARGUMENT

1. Petitioner's principal contention (Pet. 4-7) is that the Secretary was required to show that petitioner's employees were exposed to a "significant risk" of harm in order to establish a violation of the trenching standard. For this contention, petitioner relies on *Industrial Union Department* v. *American Petroleum Institute, supra*, where a plurality of the Court concluded, based on the statutory definition of "occupational safety and health standard" in Section 3(8) of the Act,[3] that the Secretary must make a threshold finding of "significant risk of material * * * impairment" before issuing any new, permanent standards under Section 6(b). 448 U.S. at 639-640. The court of appeals correctly refused to apply *Industrial Union Department* to this case, which involves enforcement of a specific Section 6(a) standard.

As the court below concluded (Pet. App. A-5 to A-6), *Industrial Union Department* is inapposite because that case concerned the Secretary's authority to promulgate Section 6(b) standards, not his authority to remedy violations of "specific" Section 6(a) standards like the one at issue here. "Specification" standards like the trenching regulation are premised on the conclusion that the proscribed conditions necessarily present a hazard and that adherence to the precise rules, which Section 6(a) directed the Secretary to adopt from standards predating the Act,[4]

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[3] Section 3(8) of the Act, 29 U.S.C. 652(8), defines an "occupational safety and health standard" as one that is "reasonably necessary or appropriate to provide safe or healthful employment" (Pet. App. A-15).

[4] Petitioner now contends (Pet. 6-7) for the first time in this litigation that the trenching regulation may not be enforced without a "significant risk" finding because Section

eliminates or reduces the risk of injury. See *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, 511 F.2d 864, 869 (10th Cir. 1975).

Thus, 29 C.F.R. 1926.652(b) establishes a per se rule: the standard specifies the precise circumstances in which it is applicable (here, trenches opened in unstable or soft material) and furnishes employers unequivocal notice of its requirements (slope the trench sides at a 45-degree angle or reinforce them). Because the rule is based on a conclusion that a hazard exists in a given situation absent the prescribed precautions, there is no reason to impose further conditions upon enforcement of the regulation

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6(a), 29 U.S.C. 655(a), which authorized the Secretary to issue the standard, is itself an unconstitutionally broad delegation of legislative power. There are no "exceptional circumstances" present here to warrant departure from the Court's ordinary practice of declining to consider an argument not presented to the court below. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). In any event, the contention is meritless. In Section 6(a) Congress virtually commanded the Secretary to adopt pre-existing safety and health standards established under other federal statutes or by private standard-setting organizations. The Secretary's authority to promulgate standards under Section 6(a) was subject to the provisions of Sections 3(9) and 3(10) of the Act, 29 U.S.C. 652(9) and (10) (defining "national consensus standard" and "established Federal standard"), and Section 6(a) itself afforded the Secretary little discretion, requiring the promulgation of "national consensus standards" and "established Federal standards" except in the unusual case in which the Secretary determined that no improvement in safety and health would result. Given these narrow provisions, there is no basis to petitioner's "unconstitutional delegation" claim. See *Plum Creek Lumber Co.* v. *Hutton*, 608 F.2d 1283, 1288 (9th Cir. 1979); *Blocksom & Co.* v. *Marshall*, 582 F.2d 1122, 1125-1126 (7th Cir. 1978).

by the addition of another element of proof such as the "significant risk" limitation applicable in the rulemaking context. Requiring proof of "significant risk" on a case by case basis would defeat the purpose of a per se rule, which is based on an aggregate assessment as to risk and which is designed to establish a standard easily applied by employers and uniformly enforced by the Secretary.[5] Indeed, in addition to the court below, every court of appeals that has addressed this issue in the context of "specification" standards has agreed that the Secretary has carried his burden of establishing a prima facie case of a violation upon proof of the standard's requirements and the employer's noncompliance. See *Bunge Corp.* v. *Secretary of Labor*, 638 F.2d 831, 835-836

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[5] For similar reasons, a rulemaking requirement such as assessment of "significant risk" simply is not compatible with the enforcement process because it has the potential of transforming each enforcement proceeding into a separate rulemaking. The determination of a significant risk, as contemplated by the plurality in *Industrial Union Department*, is a judgment based in great measure on research and extensive expert inquiry about the probabilities of injury or illness under certain working conditions, as well as on policy considerations. 448 U.S. at 652-658. That determination extends far beyond an assessment whether working conditions at a particular worksite on a particular occasion are hazardous. Moreover, to impose on the Secretary the evidentiary burden of establishing a significant risk each time the Secretary discovers an instance of noncompliance with the standard would overwhelm the enforcement process and thereby render it ineffective. Such a result would be particularly contrary to Congress' intent, in enacting Section 6(a), to establish an immediately effective "nationwide minimum level of health and safety." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 6 (1970). See *Daniel International Corp.* v. *OSHRC*, 656 F.2d 925, 927-928 (4th Cir. 1981); *Diebold, Inc.* v. *Marshall*, 585 F.2d 1327, 1330-1331 (6th Cir. 1978).

(5th Cir. 1981); *Greyhound Lines-West* v. *Marshall*, 575 F.2d 759, 762 (9th Cir. 1978); *Lee Way Motor Freight, Inc.* v. *Secretary of Labor*, *supra*, 511 F.2d at 869. See also *F.X. Messina Construction Corp.* v. *OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974). This question does not warrant further review.[6]

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[6] Petitioner's assertion (Pet. 5) that the decision below conflicts with *Pratt & Whitney Aircraft* v. *Secretary of Labor*, 649 F.2d 96 (2d Cir. 1981), is incorrect. The court there reviewed the application of a materially different type of standard, prohibiting interconnecting exhaust systems where the combination of fumes being vented away "may constitute a * * * hazard." 29 C.F.R. 1910.94(d)(7)(iii). By its own terms, this "nonspecific" standard required the Secretary to establish, as a part of his prima facie case, that a "hazard" existed. Although the Second Circuit, in fleshing out the nature of the requisite showing of a hazard, did rely on the plurality's discussion of significant risk in *Industrial Union Department*, the result in *Pratt & Whitney* was not compelled by anything in *Industrial Union Department*. On the contrary, the same result could have been reached through an objective "reasonable person" test similar to that used in numerous cases to ascertain whether a cited employer has failed to comply with a standard the violation of which turns on the existence of a "hazard." See, *e.g.*, *Bunge Corp.* v. *Secretary of Labor*, *supra*, 638 F.2d at 834, 835-836 (differentiating the Secretary's burden of proof depending on the standard's specificity); *Voegele Co.* v. *OSHRC*, 625 F.2d 1075, 1077-1079 (3d Cir. 1980). Thus, *Pratt & Whitney* does not conflict with the decision below because it addresses a "nonspecific" standard that applies only if a hazard is shown, whereas the trenching standard at issue here is a "specific" or per se rule.

Petitioner also claims (Pet. 5) that the decision below conflicts with *Louisiana Chemical Association* v. *Bingham*, 657 F.2d 777 (5th Cir. 1981). That case, which held that the Secretary's regulation governing access to medical records is not an occupational safety and health standard, is irrelevant to any issue presented here.

2. Petitioner contends (Pet. 7) that the court of appeals' refusal to find 29 C.F.R. 1926.652(b) unconstitutionally vague conflicts with the Ninth Circuit's decision in *Lloyd C. Lockrem, Inc.* v. *United States*, 609 F.2d 940, 943-944 (1979). Petitioner, however, did not rely on *Lockrem* in the court of appeals nor did it present the vagueness contention at issue in *Lockrem*. Accordingly, this claim is not properly presented here. See note 4, *supra*. There is no conflict in any event, for the two courts addressed wholly unrelated vagueness contentions. The court below concluded (Pet. App. A-6) that Section 1926.652(b) enunciates ascertainable standards that fairly enable employers to conform their conduct to the requirements of the regulation. The court in *Lockrem*, on the other hand, ruled that a different standard, pertinent to "excavations," did not provide employers a "reasonable opportunity to know" that it applied to "trenches" as well, particularly since the Secretary also had other standards applicable to trenches alone. 609 F.2d at 943-944.

3. Petitioner's final contention (Pet. 7-8) is that the court of appeals misapplied the substantial evidence test in evaluating the ALJ's finding that the soil in the trench was soft or unstable. This Court recently has reaffirmed that it regards determinations by the courts of appeals under the substantial evidence test as final, unless that standard "appears to have been misapprehended or grossly misapplied." *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 523 (1981). No such aberration has occurred in this case. While the court of appeals candidly indicated that it might well have issued findings different from those of the ALJ, it acknowledged that under the substantial evidence test it

could not, on that ground alone, reverse the Commission (Pet. App. A-4 to A-5). The court below acted properly in refusing to substitute its judgment for that of the fact finder; the possibility of drawing two inconsistent conclusions from the record does not prevent a particular finding from being supported by substantial evidence. See *American Textile Manufacturers Institute, Inc.* v. *Donovan, supra*, 452 U.S. at 523. Particularly because this case "turned upon a close question of credibility" involving expert witnesses (Pet. App. A-5), the court below was amply justified in refusing to disturb the administrative law judge's resolution of the conflicting testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 374718 904